SC86948

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL.

GENERAL MOTORS ACCEPTANCE CORPORATION,

Relator,

vs.

THE HONORABLE RICHARD E. STANDRIDGE,

Respondent.

On Petition for Writ of Prohibition from the Circuit Court of Jackson County, Missouri, Associate Circuit Judge Division The Honorable Richard E. Standridge

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REPLY BRIEF OF RELATOR GENERAL MOTORS ACCEPTANCE CORPORATION

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ATTORNEYS FOR RELATOR GENERAL MOTORS ACCEPTANCE CORPORATION

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INTRODUCTION

In a response laced with invective and half-truths, Marcum attempts to brush aside the substantive issues before this Court by misportraying General Motors Acceptance Corporation ("GMAC") as recalcitrant. Marcum's brief on behalf of Respondent seems calculated to maximize distraction and confusion while minimizing substantive discussion of the issues. GMAC submits this Reply Brief to correct the facts and refocus on the important legal issues at hand.

STATEMENT OF FACTS

Marcum opens his brief with a few alleged factual disputes, but as explained below, Marcum's quibbles range from illusory, to immaterial, to simply incorrect.

Marcum first takes issue with the particulars of title delivery and accuses GMAC of error by suggesting that state authorities have any involvement in vehicle titling. GMAC has always emphasized the dealer's role in the process, but obviously the process cannot be completed without some involvement (depending on variables in each transaction) by the governmental agency authorized to issue title paperwork. *See* Marcum Brief at 8-9 (quoting prior GMAC briefing that dealerships send title paperwork to state agency). None of this should distract from the obvious and undisputed fact that GMAC does not issue or deliver title or control the process.

In an apparent effort to avoid a disposition on the merits, Marcum repeatedly suggests that GMAC's discovery filings were somehow technically

deficient even though the parties and Respondent always addressed issues on the merits. For example, Marcum argues that "GMAC did not assert, in its initial objections, that it would be unduly burdensome to produce the information sought." Marcum Brief at 8. In fact, GMAC responded to document requests corresponding to Interrogatory Nos. 9 and 10 that the "request would require a search of all records kept by Plaintiff at any of its offices for any account that may have been transacted in the State of Missouri or Kansas." Appendix 29, 32. Moreover, in the context of an interrogatory to a national company conducting hundreds of thousands of transactions, an objection stating the discovery "is unlimited in time and scope and nature and is overly broad" (Appendix 24) necessarily entails the concept of burdensomeness. Case law also confirms that burdensomeness is inherent in the balancing process a court must employ to resolve objections of overbreadth and relevance. *See, e.g., State ex rel. Anheuser v. Nolan,* 692 S.W.2d 325, 328 (Mo. App. 1985).

Marcum attempts to minimize his discovery by pointing out that Interrogatory No. 10 sought discovery for approximately a five-year period regarding all Missouri and Kansas buyers who ever complained to GMAC that the selling dealer had not assigned them title upon delivery of the vehicle. Appendix 25. This is immaterial because the burden on GMAC remains the same—buyers who complained to GMAC (as requested in Interrogatory No. 10) are a subset of the universe covered by Interrogatory No. 9, namely all buyers in Kansas and Missouri about whom GMAC had any knowledge of the buyer not

receiving title within thirty days. Certainly Marcum never offered to limit all his discovery to a five-year period.

Marcum attempts to characterize GMAC's motion for protective order as too little and too late based on a supposedly definitive ruling on his motion to enforce discovery at an unrecorded hearing on March 29, 2005. The parties apparently disagree about comments made by Respondent during that hearing (*compare* Petition ¶ 20 *with* Return ¶ 20), but the record does not support Marcum's contention. If the hearing of March 29 had produced the result Marcum now claims, Respondent presumably would not have granted continuances to allow further consideration of the issues. Thus, Marcum's attempt to portray whatever happened on March 29 as a definitive disposition with a presumptively rational basis stretches a cryptic docket notation beyond all recognition.[1] Even more unsupported is Marcum's fictionalized account of Respondent as "frustrated" by GMAC's pleadings and actions. Marcum Brief at 21. Respondent never criticized GMAC or its counsel, but did urge *both parties* to attempt to resolve the issues during continuances.

Although he never responded to GMAC's Motion for Protective Order on the merits (instead seeking only to strike it on a perceived technicality (Appendix

[1] Marcum never responds directly to GMAC's argument and supporting case authority that Respondent's unexplained decision itself is an indication of an abuse of discretion. GMAC's Opening Brief at 22.

89-90)), Marcum now argues it is insufficient. For example, Marcum belittles GMAC's affiants for lack of omniscience, but both of them stated under oath that they had "personal knowledge of all statements contained herein." Appendix 74, 78. He faults them for not estimating the burden and expense of a five-year search, but as explained above, Marcum never offered to limit all discovery to five years and the one interrogatory with a timeframe of roughly five years called for information that was a subset of the more expansive ten-year discovery. Marcum also complains of insufficient information about GMAC's debt manager screens, which are an additional record of activity on loss accounts. Appendix 69 n.3. Once again, such information would at best pertain to a subset of the broader discovery covering GMAC customers in a two-state region, and in any event, additional searching through an additional database can only result in additional cost over and above the estimate contained in GMAC's motion for protective order.

Finally, Marcum repeatedly attacks the affiants and GMAC for allegedly concealing information and discovery regarding the "Title Administration Department." *See, e.g.*, Marcum Brief at 9-10, 19-20, 26. Marcum launches this argument based on a letter dated November 21, 2000 that he received inquiring about the status of the title on his vehicle. Appendix 103. The typed signature on this form letter is "Title Administration Department"; further examination of the letterhead reveals the origin of the letter as "GMAC c/o PDP Group, Inc." *Id.* Marcum then asserts he "made yet another proposal to pare down discovery by

simply matching up GMAC's title department records with the deficiency actions it filed. GMAC, consistent with its prior conduct, *ignored his proposal*." Marcum Brief at 26 (emphasis added); s*ee also id.* at 31 (claiming GMAC "rebuffed" this proposal). In reality, PDP Group, Inc. is an outside vendor for GMAC; far from ignoring Marcum's proposal, GMAC responded with interest,[2] (Supp. Appendix 132 (A1)) investigated the possible scope of such discovery (Supp. Appendix 134 (A3)), and provided statistical information about records available from PDP Group, along with an offer to coordinate and facilitate such discovery. (Supp. Appendix 136-37 (A5-A6). Thus, Marcum is wrong when he asserts GMAC "balked" (Marcum Brief at 21); instead, it was Marcum who rejected this compromise and pressed ahead with the expansive discovery that is now before this Court. If Marcum wanted to have this case decided on the basis of some other discovery request, he should have withdrawn his original discovery and served more carefully tailored requests. He is not entitled to overbroad, burdensome and irrelevant discovery just because he claims he was willing to narrow it but never did so.

[2] In order to refute Marcum's false allegations and as further support for paragraph 25 of its petition regarding efforts to resolve the impasse, GMAC has submitted with this reply brief a supplemental appendix which contains the referenced items. They are also included in the appendix to this brief.

I. Abuse of Discretion on Discovery

Although Marcum scarcely acknowledges the principle, this Court has made it clear that the propriety of discovery must be evaluated in light of the operative pleading—Marcum's counterclaim for malicious prosecution. *See* GMAC's Opening Brief at 16-17. The essence of the alleged wrong is that GMAC *filed suit* to collect a deficiency on a transaction that was void. Appendix 10. Rather than framing discovery in terms of this transaction, this dealer, or even other similar transactions that resulted in collection litigation, Marcum framed much broader discovery encompassing all Kansas and Missouri buyers "regarding whose transaction GMAC *has any knowledge* that the buyer did not receive a title to his or her vehicle within 30 days of the sate [sic] of the vehicle as delivered to the buyer." Appendix 24 (emphasis added). Interrogatory No. 10 asks for a subset of such buyers, namely those who complained to GMAC about title delivery. Appendix 25. In companion document requests Marcum seeks documents corresponding to these interrogatories. Appendix 29-30.

In support of this discovery, Marcum relies on *Brockman v. Regency Financial Corp.*, 124 S.W.3d 43, 50 (Mo. App. 2004), and its statement about the scope of admissible evidence on malice. Marcum Brief at 17. Marcum repeatedly quotes passages from *Brockman* upholding the admission of evidence regarding the defendant's "conduct in *suing other parties*" and "pursuit of *lawsuits*." *Brockman*, 124 S.W.3d at 51 (emphasis added). *See* Marcum Brief at 18, 24.

Marcum's reliance on *Brockman* is misplaced because Marcum's discovery is not about lawsuits or litigation. It inquires about mere *knowledge* GMAC had of any title defect, regardless of whether litigation ever ensued. Missouri courts have repeatedly emphasized that discovery of other products, incidents or complaints must be sufficiently comparable to the case at hand in order to be discoverable. *See, e.g., State ex rel. Ford Motor Co. v. Nixon,* 160 S.W.3d 379 (Mo. banc 2005); *State ex rel. Kawasaki Motors Corp. v. Ryan,* 777 S.W.2d 247 (Mo. App. 1989). Marcum failed to tailor his discovery using criteria that might yield results reasonably comparable to his own situation.

At the most basic level, Marcum failed to limit his discovery to other lawsuits by GMAC and to use other factors showing comparability, such as the state law governing titling of the vehicle purchased, the dealer or other decision makers involved in the titling process, and so forth. Under Marcum's theory, GMAC's mere knowledge of any transaction—regardless of time, place or any other circumstance—is sufficient justification for wide-open discovery; Marcum's position is therefore indistinguishable from the plaintiff who sought identification of each and every asbestos-containing product ever manufactured by Ford Motor Company over more than 100 years. *State ex rel. Ford Motor Co. v. Nixon,* 160 S.W.3d 379 (Mo. banc 2005).

In an effort to justify the near limitless scope of his discovery and reconcile it with the relatively narrow scope of lawsuit-based evidence in *Brockman,* Marcum attempts to reframe his discovery as covering any situation where GMAC

"*pursued* other consumers on void contracts." Marcum's Brief at 18 (emphasis added). Marcum never explains how mere knowledge by GMAC of a title defect translates into "pursuit" of an automobile buyer. For example, Marcum's discovery would include a transaction where GMAC learned of a title defect after it had already been cured, where the buyer continued to pay without any dissatisfaction, and where no one even contemplated litigation. Even in cases where a letter regarding some titling defect was sent on behalf of GMAC, sending a letter is in no way comparable to invoking the judicial process to seek a judgment. A letter can only express an opinion, pose a question, or propose a course of action, and a letter without a subsequent lawsuit can support no inference whatsoever about the motive of the letter writer. If suit never arises, perhaps the facts did not support the claim, or the economics did not justify litigation, or the circumstances were sufficiently debatable that one or both parties chose a course of action that obviated litigation. One thing is crystal clear—there can be no malicious prosecution without *prosecution*.

Marcum makes no attempt to justify the roughly $1,000,000 cost of this discovery, nor does he seriously challenge the validity of GMAC's estimate. It is simply no response to suggest that GMAC should have estimated the cost of a five-year search (when Marcum never agreed to limit all his discovery requests to five years), or that GMAC should have detailed the cost of discovery regarding debt manager screens (when Marcum sought discovery covering all GMAC accounts), or that GMAC should have offered discovery through its "title

administration department" (when GMAC offered—and Marcum refused—discovery of the third-party vendor who handles such functions). It is particularly difficult for Marcum to justify the exorbitant costs to GMAC, given the prior admission by his counsel that if "there is literally no way to ferret out the requested information than to review 540,000 loan screens at a cost approaching $1 million, we would of course agree that this would be prohibitively burdensome and expensive." Appendix 101.

II. Abuse of Discretion in Rejecting Cost-Shifting

Marcum concedes that cost shifting is appropriate in some circumstances and that the cases previously cited by GMAC are authoritative. Marcum merely disputes its applicability to this case based on the assertion that the discovery is "absolutely relevant and crucial to the issue of GMAC's intent in choosing to sue Marcum." Marcum Brief at 30. Discovery that is not even limited to other situations in which GMAC chose to sue cannot support that overblown claim. Even assuming Marcum's discovery has any merit whatsoever, it is nevertheless entirely out of proportion to this case, so Marcum should be required to pay some or all of the costs.

Once again, Marcum attempts to justify his position in opposition to cost-shifting by suggesting that GMAC "rebuffed" his effort to limit discovery to records of the "title administration department" (i.e. PDP Group, Inc.). Marcum Brief at 31. As the items in the supplemental appendix (and the appendix to this brief) well illustrate, Marcum's contention is false. Having failed to serve focused

and cost-effective discovery, Marcum should bear the costs of this extremely expensive and burdensome discovery, even assuming it is otherwise permissible.

III. No Jurisdiction Over Unaccrued Claim

Marcum first argues that this point is somehow foreclosed by the Court's preliminary writ of prohibition. It is unquestionably the Court's prerogative to define the scope of this proceeding and the meaning of its preliminary writ, but absent any express statement that the Court intended summarily to deny any aspect of GMAC's petition, it seems appropriate to brief the issue.

Marcum largely ignores the case authority cited by GMAC, which is squarely on point. *See* GMAC's Opening Brief at 26-27. Instead, he discusses three rules of civil procedure, but none of these permits the assertion of an unaccrued counterclaim for malicious prosecution. Marcum's reliance on Rule 55.06(b) is entirely misplaced because it refers to the joinder of multiple alternative claims for relief by a single party rather than one claim by a plaintiff and one counterclaim by a defendant; Rule 55.06(b) does not address the assertion of an unaccrued counterclaim. Rule 55.32(d) does address a counterclaim maturing or acquired after pleading, but only permits its assertion by supplemental pleading, whereas the operative pleading here is the counterclaim Marcum filed while GMAC's petition was pending. Rule 55.33(d) governs supplemental pleadings (not, as Marcum suggests, amended pleadings, which are governed by Rule 55.33(a)). Under this rule, a court may grant permission for a supplemental pleading "even though the original pleading is *defective* in its statement of a claim

for relief or defense." Attempting to assert an unaccrued claim is not simply a pleading defect—the claim does not exist so there is no basis for the exercise of jurisdiction. To attempt to sue for malicious prosecution before the prior action terminates is functionally no different than attempting to sue for personal injuries before an automobile collision occurs. These are not merely defectively stated claims; these are nonexistent claims.

Even though Marcum ignores GMAC's other cases on this point, he erroneously attempts to portray as favorable the decision in *J.C. Jones & Co. v. Doughty*, 760 S.W.2d 150 (Mo. App. 1988), where a counterclaim for wrongful attachment that failed to plead a prior and final determination was held "fatally defective." *Id*. at 158. This is no different than Marcum's attempt to counterclaim for malicious prosecution while GMAC's collection action was pending. The decision also negates Marcum's attempted reliance on Rules 55.06 and 55.32 because the court explained that those rules regarding supplemental pleadings and joinder of claims still require that a "claim" first be in existence. *Id.* at 160. However, a *fatally defective* pleading cannot be saved by these rules. *Id.*

Marcum concludes by carrying his own argument the short distance to its logical extreme—that Missouri law should be construed to require a claim for malicious prosecution to be asserted as a compulsory counterclaim in the underlying suit or be forever barred. Marcum Brief at 36 (citing North Carolina and Tenth Circuit authority). Regardless of what other jurisdictions may choose to do, this approach does not conform to Missouri law and would actually foster the

filing of additional claims for malicious prosecution, which could in turn spawn still more claims for malicious prosecution in reply. This Court should not construe its rules in a manner to foster premature and unnecessary litigation.

CONCLUSION

GMAC renews its request for relief as set forth in its petition and opening brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. The reply brief includes the information required by Rule 55.03;

2. The reply brief complies with the limitations contained in Rule 84.06(b);

3. According to the word count function of counsel's word processing software (Microsoft® Word 2002), the reply brief contains 2,930 words; and

4. The floppy disk submitted herewith containing a copy of this reply brief has been scanned for viruses and is virus-free.

_____
R. Kent Sellers

CERTIFICATE OF SERVICE

On this 21st day of October, 2005, I hereby certify that two copies of the above and foregoing together with a copy of this reply brief on disk were served by hand delivery, addressed to:

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APPENDIX

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